

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 In re

10 MARY T. WHATLEY,
11 Debtor.

12 _____
13 MICHAEL B. MCCARTY,
14 Trustee, Plaintiff, Appellee,

15 v.

16 ARTHUR G. LANDAUER, *et al.*,
17 Defendants, Appellants.

Case No. C05-1227L

Bankr. Case No. 03-18393
Adv. Proc. No. 04-01069

ORDER DENYING AND
DISMISSING APPEAL

18
19
20 **I. INTRODUCTION**

21 This matter comes before the Court on an appeal from an order of the United
22 States Bankruptcy Court for the Western District of Washington. Appellant Arthur
23 Landauer ("Landauer") appeals a May 27, 2005 order from the Bankruptcy Court
24 requiring that the trustee receive an extraordinary equity distribution from the sale of a

1 piece of real property previously owned by business partners Landauer and debtor Mary
2 Whatley (“Whatley”). The Bankruptcy Court’s order allows the trustee to receive 50% of
3 the proceeds of the sale, plus an additional amount equal to half the amount paid to
4 Landauer’s brother to pay off his encumbrances on the property.

5 For the reasons set forth in this Order, the Court denies Landauer’s appeal.¹

6 **II. DISCUSSION**

7 **A. Background.**

8 Landauer and Whatley, through their business partnership, purchased a
9 commercial property in Bellingham, Washington (the “Bellingham Property”) in 1984
10 through a deed of trust. When the deed of trust became due in 1990, Landauer and his
11 family purchased it and assigned it to Landauer’s brother, Larry Landauer. In 1994,
12 Whatley borrowed funds and secured the loan with a note and deed of trust on the
13 Bellingham Property. When the note became due, Landauer and his family purchased the
14 deed and note and assigned them to Larry Landauer. Landauer also alleges that Whatley
15 drained over \$400,000 in assets from the Bellingham Property in loans, a garnishment,
16 and other disbursements. Whatley counters that Landauer grossly mismanaged the
17 Bellingham Property, significantly increasing the debt to Larry Landauer and decreasing
18 rental income.

19 In 1997, Landauer filed for Chapter 13 bankruptcy. During the course of the
20 bankruptcy proceeding, Landauer brought an adversary proceeding against Whatley.
21 Whatley counterclaimed for dissolution of the partnership, sale of the Bellingham
22 Property, accounting, breach of fiduciary duty, and mismanagement. Whatley and
23

24 ¹ At the request of both parties, the Court heard oral argument in this matter on
25 February 16, 2006.

1 Landauer agreed to settle the adversary proceeding. The parties memorialized the terms
2 of the agreement in a proposed order. Judge Glover heard oral argument on the matter,
3 and signed the proposed order on November 14, 1997 (the “1997 Order”). The 1997
4 Order established a formula for dividing the rental proceeds generated by the Bellingham
5 Property. The 1997 Order directed that the parties utilize the rental proceeds to pay off
6 Larry Landauer’s encumbrances, then Whatley would receive all of the rental proceeds
7 “until Landauer has compensated Whatley for an amount equal to 50% of the money paid
8 to Larry Landauer” Record on Appeal at p. 57. The 1997 Order did not address the
9 sale of the property.

10 Whatley filed for Chapter 7 bankruptcy in 2003. The trustee filed an adversary
11 complaint seeking a sale of the Bellingham Property, dissolution of the partnership, an
12 accounting, a determination of the validity and priority of Larry Landauer’s deeds of
13 trusts, and a determination of the extent and validity of the encumbrance held by another
14 trustee. Record on Appeal at pp. 8-9. On September 23, 2004, Judge Glover granted the
15 trustee’s motion to dissolve the partnership. In May 2005, Landauer filed a motion for
16 partial summary judgment for an order striking the trustee’s claim that Larry Landauer’s
17 deeds “are paid and should be discharged,” and striking the trustee’s claim that Whatley’s
18 estate was “entitled to an extraordinary equity distribution upon sale” of the Bellingham
19 Property based on the 1997 Order. Record on Appeal at p. 43.

20 Judge Glover granted in part and denied in part the motion for summary judgment
21 (the “Summary Judgment Order”). Judge Glover struck the claim regarding Larry
22 Landauer’s deeds because the trustee did not dispute the motion on that count. Record on
23 Appeal at p. 145. Judge Glover denied the motion “with respect to Defendants’
24 contention that the [1997 Order] is restricted to rental proceeds from the . . . Bellingham
25

1 Property.” Judge Glover further ordered,

2 [U]pon the sale of the Bellingham Property, after payment of the allowed claims of
3 Larry Landauer that encumber the Bellingham Property . . . the Trustee on behalf
4 of the estate shall be entitled to receive the estate’s 50% net proceeds of sale and
5 Arthur G. Landauer’s 50% of net proceeds of sale until Arthur G. Landauer has
6 compensated the estate for an amount equal to one-half of the amounts paid to
7 Larry Landauer for his allowed secured claims against the Bellingham Property;
8 and thereafter, the net proceeds of sale shall be divided equally between the
9 debtor’s estate and Arthur G. Landauer.

10 Record on Appeal at p. 145. Landauer appeals the Summary Judgment Order.

11 **B. Analysis.**

12 In his opening memorandum, the trustee lists the following as one of his issues for
13 review, “Is an order denying Appellant’s Motion for Partial Summary Judgment an order
14 from which an appeal can be taken?” Appellee’s Opening Brief at p. 1. This Court has
15 jurisdiction to hear appeals “from final judgments, orders, and decrees.” 28 U.S.C. §
16 158(a)(1). “Rule 54(b) controls the analysis of finality of judgments for purposes of
17 appeal in federal civil actions, including bankruptcy adversary proceedings.” Belli v.
18 Temkin (In re Belli), 268 B.R. 851, 855 (9th Cir. BAP 2001).

19 Although there is no judgment or Rule 54(b) certification, this Court may treat the
20 appeal as a motion for leave to appeal, and it does so. Belli, 268 B.R. at 856-57. The
21 Court may exercise its discretion “to grant leave to appeal in order to avoid wasteful
22 litigation and expense where the appeal presents a meritorious issue on a controlling
23 question of law and an immediate appeal would materially advance the ultimate
24 termination of the litigation.” Cameo Dev. Co. v. Larkin (In re Cameo Dev. Co.), 2005
25 U.S. Dist. LEXIS 22311 at *19 (D. Ariz. Sept. 28, 2005) (quoting In re Belli, 268 B.R. at
26 857). Allowing the interlocutory appeal in this case is appropriate because the Summary
Judgment Order resolved a discreet issue: the appropriate division of proceeds from the
already completed sale of the Bellingham Property. Resolving the appeal now will

1 prevent the need to conduct further proceedings on the same issue, and will provide
2 certainty for the parties.

3 Having exercised its discretion to hear the appeal, the Court considers the merits
4 of appellant's contention that the Bankruptcy Court erred. As an initial matter, the parties
5 dispute whether Judge Glover, in construing the 1997 Order, was construing his own
6 prior order or interpreting the parties' contract. The former situation leads to review for
7 abuse of discretion, while the latter leads to *de novo* review. See, e.g., In re Franklin, 802
8 F.2d 324, 326 (9th Cir. 1986).² Landauer argues that the 1997 Order is a consent order
9 entered after settlement of the parties, and analogizes this case to In re Penberthy, 211
10 B.R. 391, 395 (W.D. Wash. 1997) (applying contract principles to construe a
11 reorganization plan). The 1997 Order, however, is not a plan of reorganization.
12 Furthermore, in signing the 1997 Order, Judge Glover did not simply adopt the parties'
13 settlement agreement. Rather, he heard oral argument on the matter, analyzed the issues,
14 and incorporated his independent decision into the 1997 Order. Record on Appeal at p.
15 107 ("[Y]ou settled it just about where I was coming out"). In his oral ruling on the
16 Summary Judgment Order, Judge Glover stated,

17 In terms of the other portion of the summary judgment, the Court is asked to
18 construe its own order. It's a little more difficult, in one sense, and that is because
19 this was a stipulated order. But just because it was stipulated doesn't lessen the
responsibility of the Court because I accepted the stipulation; and by signing the
order, the order becomes mine.

20 Record on Appeal, Transcript at p. 10. Therefore, the Court finds that the Summary

21
22 ² In In re Franklin, the court stated, "Simply put, bankruptcy courts must retain
23 jurisdiction to construe their own orders if they are to be capable of monitoring whether
24 those orders are ultimately executed in the intended manner." 802 F.2d at 326. The
25 rationale for applying that principle is even stronger in this case because Judge Glover
was interpreting his *own* prior order, whereas in In re Franklin, the bankruptcy court
judge was interpreting an order by another bankruptcy court judge.

1 Judgment Order construes the Bankruptcy Court's own 1997 Order, and the abuse of
2 discretion standard applies.

3 Landauer argues that the Bankruptcy Court erred in ordering the distribution to
4 Whatley because a condition precedent of that payment, the payment to Larry Landauer,
5 has not occurred. The Summary Judgment Order, however, ordered that the payment to
6 Larry Landauer occur before the payment to Whatley's estate. Therefore, the condition
7 precedent will be met before the payment to Whatley.

8 Landauer further contends that the Summary Judgment Order ignored the phrase in
9 the 1997 Order, "the net proceeds from the Bellingham Building shall be split 50-50 for
10 accounting purposes." The "net proceeds," however, referred to rental proceeds, not to
11 proceeds from a sale, which was not contemplated. Similarly, Landauer argues that the
12 equity distribution is improper because it is inconsistent with his intent in entering into
13 the settlement in 1997. Neither party, however, considered sale of the property at that
14 time. Judge Glover was therefore left to determine the appropriate distribution of the sale
15 proceeds in light of his 1997 Order and his extensive experience presiding over the
16 parties' disputes.

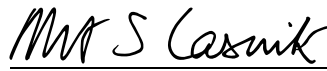
17 Judge Glover noted, in signing the 1997 Order, that the purpose of the payments to
18 Whatley were twofold: (1) to compensate Whatley for "having basically fronted the
19 money to pay off Larry Landauer's debt," and (2) to structure the payments, including
20 any equity in the building, so that Landauer's Chapter 13 bankruptcy could proceed.
21 Record on Appeal at pp. 101, 104. Neither party objected to those characterizations. In
22 ruling on the summary judgment motion, Judge Glover found that applying the
23 distribution formula from the 1997 Order to the sale proceeds was consistent with both of
24 those purposes. Record on Appeal, Transcript at pp. 10-13. Landauer has not shown that
25

1 the Bankruptcy Court's Summary Judgment Order was the result of an abuse of
2 discretion.

3 **III. CONCLUSION**

4 For all of the foregoing reasons, the Court DENIES and DISMISSES the appeal.
5 The Clerk of the Court is directed to send copies of this Order to all counsel of record and
6 to the Bankruptcy Court.

7
8 DATED this 17th day of February, 2006.
9

10
11 
12 Robert S. Lasnik
13 United States District Judge
14
15
16
17
18
19
20
21
22
23
24
25